A

RHB BANK BHD v. MOGANA SUNTHARI SUBRAMANIAM

COURT OF APPEAL, PUTRAJAYA
ALIZATUL KHAIR OSMAN JCA
VARGHESE GEORGE JCA
B NALLINI PATHMANATHAN JCA
[CIVIL APPEAL NO: B-02(NCVC)(W)-830-05-2014]
17 FEBRUARY 2016

C ***BANKING:*** *Banks and banking business – Negligence – Allegation of – Unauthorised transactions involving legal firm's accounts – Negligent payment out of encashment of cheques issued by legal firm – Whether bank complied with mandate given by legal firm – Cheques signed by duly authorised signatories and validly issued from firm's cheque books – Whether bank liable for paying out on duly mandated cheques – Duty of care – Whether extended to detecting internal fraud*
D *and unauthorised acts of third parties – Whether legal firm contributorily negligent – Whether common law duty on customer's part to notify bank immediately of unauthorised cheques – Whether there was delay in instituting suit – Whether negligence established against bank*

E ***BANKING:*** *Banker and customer – Action by customer against bank – Locus standi – Negligent payment out of encashment of cheques issued by legal firm – Proper party to initiate action against bank – Whether plaintiff as partner of legal firm entitled to recovery of monies from bank in personal capacity – Whether plaintiff could benefit from cause of action – Whether plaintiff possessed requisite locus standi to bring action*

F ***LIMITATION:*** *Cause of action – Accrual of – Negligent payment out of encashment of cheques issued by legal firm – Whether cause of action arose from date when cheque negligently paid out – Whether acts complained of caught by limitation – Limitation Act 1953, s. 29 – Whether applicable*

G ***EVIDENCE:*** *Adverse inference – Non-production of material witness – Failure to call partner of law firm as witness – Whether refusal to call witness amounted to withholding of evidence – Presumption under s. 114(g) of Evidence Act 1950 – Whether ought to be invoked*

The plaintiff, a former partner of a legal firm that has since been dissolved,
H instituted a claim against the defendant bank ('the bank') seeking recovery in respect of the issuance and encashment of 373 cheques from the legal firm's client account and 189 cheques issued from the office account. The legal firm, that comprised two partners, namely the plaintiff and one Junaidah Mohd Noh ('Junaidah'), had two accounts with the bank, a client's account
I and an office account. In early 2004, the plaintiff went to Japan to further her studies. Before departing, the plaintiff had advised the bank that her husband SP3 had been appointed and given the mandate to sign cheques for

both accounts of the firm. The plaintiff had also asked her sister SP2 to fill in the details or particulars on each cheque as requested or directed by Junaidah. The request for the issuance of these cheques to various parties would be made to SP3, either directly by Junaidah or through the legal clerk, one Umapathy. Upon such issuance, the cheque would be collected by one Mohd Said, the dispatch clerk, who would show the cheque to Junaidah for verification, after which the firm's legal stamp would be placed on the cheque. Matters therefore proceeded in this somewhat unusual fashion while the plaintiff was away on her course in Japan. The plaintiff returned to Malaysia in August 2006 and discovered that unauthorised transactions had been carried out involving two accounts with the bank: RM2,485,092.17 from the client's account and RM309,489.59 from the office account. It was undisputed that the cheques in question were issued from the firm's cheque books for either the client's account or the office account, and were signed by the authorised signatory. It was the plaintiff's claim that the bank had acted negligently in that it had failed to detect or preclude these transactions. The plaintiff maintained, *inter alia*, that the bank had failed to comply with the mandates given by it to the bank; failed to take reasonable steps with regard to the irregularities in the cheques presented for encashment or approval and approved cheques that contained material amendments without procuring the requisite mandate of the signatory. The plaintiff maintained that as a consequence of such negligence, there was exposure to claims from clients. By way of defence, the bank denied all claims of negligence and maintained that it had made payments out to named payees as specified in the cheques which were signed by authorised signatories. The High Court found that the bank had been negligent in its handling of the encashment of cheques from the two said accounts and gave judgment in favour of the plaintiff. Hence, this appeal. The issues that arose were (i) whether the plaintiff possessed the requisite *locus standi* to bring the action; (ii) whether there was negligence on the part of the defendant in the conduct of the accounts of the legal firm; (iii) whether the plaintiff's claim was time-barred; (iv) whether there was undue delay on the part of the plaintiff in instituting this suit against the bank; and (v) whether s. 114(g) of the Evidence Act 1950 ought to be invoked.

Held (allowing appeal with costs)
Per Nallini Pathmanathan JCA delivering the judgment of the court:

(1) The entire cause of action was premised on the banker-customer relationship which subsisted between the bank and the legal firm, not the bank and the plaintiff. The legal firm was not at any time a sole proprietorship run solely by the plaintiff. As such, the proper party to initiate any action has to be the partners of the legal firm at the relevant time, namely the plaintiff and Junaidah, and not simply the plaintiff. Further, the plaintiff was not entitled to the recovery of any monies from the bank in her personal capacity, as she was not, in her personal

capacity, the customer of the bank. As such, the wrong party instituted this action. The plaintiff could not therefore benefit from this cause of action, which belonged to the legal firm. (paras 35-38)

(2) By reason of the cheques in issue being signed by duly authorised signatories, and as they were validly issued from the firm's cheque books, it followed that upon presentation to the bank, the bank had the mandate to pay out on those cheques. Thus, the bank could not simply be found liable for paying out on duly mandated cheques. As the bank's duty of care does not extend to detecting internal fraud on the part of its customer's employees, the bank could not be culpable for the losses sustained by the legal firm. The *modus operandi* of the firm, namely the pre-signing of cheques, coupled with the retention of the cheque books by SP2 and the issuance of the cheques at the behest of Junaidah, lends itself to abuse. Having in place such an extraordinary system of encashment, the legal firm could not now seek to lay blame on the bank for encashing duly mandated cheques validly issued by the legal firm. The duty of care owed by the bank to the customer does not extend to discovering the unauthorised acts of third parties, particularly where the cheques of the customer are validly issued and authorised. Further, no breach of institutionally accepted modes of clearance was established so as to justify a conclusion that the bank had breached its duty of care to its customer. (paras 42-45)

(3) The plaintiff's cause of action against the bank was for negligent payment out of encashment of a series of cheques issued by the legal firm. The cause of action in negligence would therefore necessarily accrue upon payment out of the cheque. The cause of action would therefore arise, or time would start to run, from the date when the cheque was negligently paid out. The date when the plaintiff discovered the same was irrelevant in a cause of action premised on negligence. As such, the trial judge had erred in applying s. 29 of the Limitation Act 1953 in construing or computing the date when the cause of action accrued. The nett consequence of this error on the part of the judge that was no less than 311 cheques were effectively caught by limitation. The plaintiff's claim was filed on 22 July 2011. Claims in negligence up to six years prior to that date gave rise to a valid cause of action in negligence. However, the acts complained in respect of the 311 cheques occurred prior to 22 July 2005 and were therefore caught by limitation. (paras 47-49)

(4) There was considerable delay on the part of the plaintiff in instituting this suit against the bank, which ran awry of the common law duty on the part of the customer to notify the bank immediately of any unauthorised cheques of which he had become aware. This was coupled with a duty to exercise due care in the drawing of the cheques so as not

to facilitate fraud or forgery. The plaintiff, and certainly the legal firm, failed to comply with this twin test as set out in the case of *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank & Ors.* (para 50)

(5) Junaidah was the partner of the law firm who had managed the administration while the plaintiff was away in Japan. All the cheques had been issued at the behest of Junaidah who had given instructions to SP2 to fill in the pre-signed cheques and hand over the same to the law firm, including all cash cheques. As such, she was in the best position to explain how and why the disputed cash cheques were encashed. Importantly, the law firm's rubber stamp was in Junaidah's control and possession and was affixed on cheques upon Junaidah's instructions. However, for no explicable reason, the plaintiff, on whom the burden of proof lies, failed to call Junaidah. This stark failure suggested that the failure or refusal to call Junaidah as a witness amounted to a withholding of evidence. The presumption under s. 114(g) of the Evidence Act 1950 ought to have been invoked, namely that if Junaidah had been called by the plaintiff, her evidence would have been unfavourable to the plaintiff. (paras 53-57)

(6) The legal firm had failed to exercise due care and caution in the drawing and issuance of cheques, had failed to put in place a system to safeguard against the acts and omissions of its employees or partners, had failed to monitor transactions from these two accounts adequately or at all, notwithstanding that monthly statements were duly issued. There was a failure to consider that the legal firm had been contributorily negligent in allowing the pre-signing of cheques and in the protocol adopted for issuance of cheques. Significantly, the plaintiff had appointed her husband a signatory, notwithstanding that he was not an advocate and solicitor, thereby breaching. Rule 7A of the Solicitors'Account Rules 1990. Further, the acts and omissions of the plaintiff's fellow partner, Junaidah, as well as the clerk Umapathy, who had since been convicted on criminal charges in respect of the irregularities arising in this case, clearly played a key role in the losses suffered by the law firm. The trial judge had failed to consider these fundamental facts, which diminished or precluded negligence on the part of the bank. Thus, this was a case where the trial court had failed to judicially appreciate the evidence. On a balance of probabilities, negligence had not been established against the bank. (paras 64-67)

Bahasa Malaysia *Headnotes*

Plaintif, seorang rakan kongsi sebuah firma guaman yang telah dibubarkan, memulakan satu tuntutan terhadap bank defendan ('bank') untuk mendapatkan kembali pengeluaran dan penunaian 373 cek-cek dari akaun pelanggan firma guaman dan 189 cek-cek yang dikeluarkan dari akaun pejabat. Firma guaman, yang mempunyai dua rakan kongsi, iaitu plaintif dan

A seorang yang bernama Junaidah Mohd Noh ('Junaidah'), mempunyai dua akaun dengan bank, iaitu akaun pelanggan dan akaun pejabat. Pada awal tahun 2004, plaintif telah ke negara Jepun untuk melanjutkan pelajaran. Sebelum berangkat, plaintif menasihati bank bahawa suaminya P3 dilantik dan diberikan mandat menandatangani cek-cek untuk kedua-dua akaun firma
B guaman. Plaintif juga meminta kakaknya SP2 untuk mengisikan butiran dalam setiap cek seperti yang diminta atau diarahkan oleh Junaidah. Permintaan pengeluaran cek-cek kepada beberapa pihak akan dibuat kepada SP3, secara langsung oleh Junaidah atau melalui kerani firma, seorang yang bernama Umapathy. Apabila cek dikeluarkan, ia akan diambil oleh Mohd
C Said, kerani penghantaran firma, yang akan menyerahkan cek itu kepada Junaidah untuk pengesahan, dan kemudiannya cap pengesahan firma itu akan diletakkan pada cek. Urusan-urusan firma dijalankan secara berterusan dalam cara yang agak luar biasa ini semasa plaintif berada di negara Jepun. Plaintif kembali ke Malaysia pada tahun Ogos 2006 dan mendapati bahawa transaksi-
D transaksi dikendalikan tanpa kebenaran yang melibatkan dua akaun firma dengan bank: RM2,485,092.17 daripada akaun pelanggan dan RM309,489.59 dari akaun pejabat. Tidak dipertikaikan bahawa cek-cek yang dipersoalkan dikeluarkan daripada buku cek firma untuk sama ada akaun pelanggan atau akaun pejabat, dan ditandatangani oleh penandatangan yang dibenarkan. Tuntutan plaintif bahawa bank bertindak secara cuai kerana ia
E gagal mengesan atau menghalang transaksi-tansaksi ini. Plaintif mengekalkan bahawa bank antara lain, gagal mematuhi mandat yang diberikan oleh firma; gagal mengambil langkah-langkah munasabah berkenaan ketidakaturan cek-cek yang diserahkan untuk penunaian atau kelulusan dan meluluskan cek-cek yang mengandungi pindaan material tanpa memperolehi mandat
F penandatangan yang diperlukan. Plaintif menegaskan bahawa akibat kecuaian tersebut, terdapat pendedahan kepada tuntutan oleh pelanggan. Melalui pembelaan, bank menafikan segala tuntutan kecuaian dan mengekalkan bahawa ia membuat bayaran kepada penerima yang dinamakan seperti yang ditetapkan dalam cek yang ditandatangani oleh penandatangan
G yang dibenarkan. Mahkamah Tinggi mendapati bahawa bank cuai dalam menangani penunaian cek-cek dari kedua-dua akaun tersebut dan memberikan penghakiman berpihak kepada plaintif. Oleh itu, rayuan ini. Isu-isu yang berbangkit adalah (i) sama ada plaintif mempunyai *locus standi* untuk membawa tindakan ini; (ii) sama ada terdapat kecuaian oleh defendan
H dalam pengendalian akaun-akaun firma guaman; (iii) sama ada tuntutan plaintif terhalang oleh had masa: (iv) sama ada terdapat kelewatan oleh plaintif dalam memulakan guaman ini terhadap bank; dan (v) sama ada s. 114(g) Akta Keterangan 1950 harus diguna pakai.

I

Diputuskan (membenarkan rayuan dengan kos)
Oleh Nallini Pathmanathan HMR menyampaikan penghakiman mahkamah:

(1) Seluruh kausa tindakan adalah berdasarkan hubungan bank-pelanggan yang wujud antara bank dan firma guaman, bukan antara bank dan plaintif. Firma guaman bukan pada bila-bila masa perniagaan tunggal yang dijalankan hanya oleh plaintif. Oleh itu, pihak yang sepatutnya memulakan tindakan adalah rakan-rakan kongsi firma guaman pada masa berkaitan, iaitu plaintif dan Junaidah, dan bukan hanya plaintif. Selanjutnya, plaintif tidak berhak atas pengembalian semula wang daripada bank dalam kapasiti peribadinya, kerana, dia bukanlah dalam kapasiti peribadinya seorang pelanggan bank. Dengan itu, pihak yang salah memulakan guaman ini. Plaintif tidak boleh mendapat manfaat daripada kausa tindakan ini, iaitu milik firma guaman.

(2) Atas alasan cek-cek ditandatangani oleh penandatangan yang dibenarkan, kerana ia dikeluarkan dengan sah dari buku cek firma, diikuti bahawa apabila ia diserahkan kepada bank, bank mempunyai mandat untuk membuat pembayaran bagi cek-cek itu. Oleh itu, bank tidak bertanggungan apabila membayar keluar cek yang dimandatkan. Oleh kerana kewajipan berjaga-jaga bank tidak dilanjutkan kepada pengesanan penipuan dalaman oleh pekerja-pekerja pelanggannya, bank tidak bersalah atas kerugian yang dialami firma guaman. *Modus operandi* firma, iaitu menandatangani cek sebelum dikeluarkan, berserta dengan pengekalan buku-buku cek oleh SP2 dan pengeluaran cek-cek atas perintah Junaidah, membuka ruang untuk salah guna. Mengamalkan satu sistem penunaian yang luar biasa, firma guaman tidak boleh sekarang menyalahkan bank kerana telah menunaikan cek-cek dengan mandat sewajarnya yang secara sah dikeluarkan oleh firma guaman. Kewajipan berjaga-jaga oleh bank kepada pelanggannya tidak dilanjutkan kepada menemui perbuatan-perbuatan pihak ketiga yang tidak dibenarkan, terutamanya di mana cek-cek pelanggan secara sah dikeluarkan dan dibenarkan. Tambahan, tiada pelanggaran mod penerimaan dibuktikan untuk membenarkan kesimpulan bahawa bank telah melanggar kewajipan berjaga-jaga kepada pelanggannya.

(3) Kausa tindakan plaintif terhadap bank adalah untuk kecuaian membayar penunaian beberapa cek yang dikeluarkan dari firma guaman. Oleh itu, kausa tindakan kecuaian semestinya terakru apabila pembayaran cek dibuat. Kausa tindakan akan timbul, atau masa akan mula berjalan, dari tarikh cek cuai dibayar. Tarikh plaintif memperolehi maklumat berkenaan perkara itu tidak relevan dalam kausa tindakan berdasarkan kecuaian. Oleh itu, hakim bicara terkhilaf apabila mengguna pakai s. 29 Akta Had Masa 1953 dalam mentafsirkan atau mengira tarikh bila kausa tindakan terakru. Kekhilafan oleh hakim ini menyebabkan 311 cek telah terhalang oleh had masa. Tuntutan plaintif difailkan pada

22 Julai 2011. Tuntutan kecuaian adalah sehingga enam tahun sebelum tarikh punca tindakan terhadap kecuaian. Walau bagaimanapun, perbuatan-perbuatan berkenaan 311 cek berlaku sebelum 22 Julai 2005 dan dengan itu terhalang oleh had masa.

(4) Terdapat kelewatan oleh plaintif dalam memulakan guaman terhadap bank, yang menyimpang daripada kewajipan common law pihak pelanggan untuk memberitahu bank berkenaan cek-cek yang tidak dibenarkan apabila dia sedar akan perkara itu. Ini ditambah pula dengan kewajipan melaksanakan dengan teliti pengeluaran cek-cek supaya tidak memudahkan penipuan atau pemalsuan. Plaintif, dan juga firma guaman, gagal mematuhi ujian yang dibentangkan dalam kes *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank & Ors.* (para 50)

(5) Junaidah adalah rakan kongsi firma guaman yang menguruskan pentadbiran semasa plaintif berada di Jepun. Semua cek dikeluarkan atas perintah Junaidah yang memberi arahan kepada SP2 untuk mengisikan cek-cek yang ditandatangani terlebih dahulu dan menyerahkannya kepada firma guaman, termasuk cek tunai. Oleh itu, Junaidah berada dalam kedudukan terbaik untuk memperjelaskan bagaimana dan mengapa cek tunai yang dipertikaikan itu ditunaikan. Cap getah firma guaman berada dalam kawalan dan milikan Junaidah dan dilekatkan pada cek-cek atas arahan Junaidah. Namun begitu, tanpa alasan yang jelas, pihak plaintif, yang mempunyai beban pembuktikan, gagal memanggil Junaidah. Kegagalan ketara ini mencadangkan bahawa kegagalan atau keengganan memanggil Junaidah sebagai saksi terjumlah kepada penyembunyian bukti. Anggapan di bawah s. 114(g) Akta Keterangan 1950 harus diguna pakai, kerana jika Junaidah dipanggil oleh plaintif, keterangannya tidak akan memihak kepada plaintif.

(6) Firma guaman gagal melaksanakan dengan teliti dan berhati-hati apabila menangani pengeluaran cek-cek, gagal meletakkan sistem melindungi terhadap perbuatan atau pengabaian pekerja-pekerja atau rakan kongsinya, gagal memantau urusniaga kedua-dua akaun ini dengan secukupnya, walaupun penyata bulanan dikeluarkan dengan sewajarnya. Terdapat kegagalan mempertimbangkan bahawa firma guaman turut cuai dalam membenarkan cek-cek yang telah ditandatangani terlebih dahulu dan dalam protokol yang diterima pakai dalam pengeluaran cek-cek. Plaintif melantik suaminya sebagai penandatangan, walaupun dia bukan seorang peguam, dengan itu melanggar k. 7A Kaedah-Kaedah Akaun Peguamcara 1990. Tambahan pula, perbuatan dan pengabaian rakan kongsi plaintif iaitu Junaidah, serta kerani guaman Umapathy, yang telah disabitkan atas pertuduhan jenayah berkenaan ketidakaturan yang timbul dari kes ini, dengan jelasnya memainkan peranan penting dalam kerugian yang dialami firma guaman. Hakim bicara gagal mempertimbangkan fakta-fakta asas ini, yang mengurangkan atau menghalang perbuatan kecuaian oleh bank. Oleh itu, ini adalah kes di

mana hakim bicara gagal mempertimbangkan secara kehakiman keterangan yang dikemukakan. Atas imbangan kebarangkalian, kecuaian bank tidak terbukti.

Case(s) referred to:
Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors [2006] 3 CLJ 1 FC ***(refd)***
Clarke v. Edinburgh and District Tramways Co Ltd [1919] SC (HL) 35 ***(refd)***
Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Lipkin Gorman (a firm) v. Karpnale Ltd [1992] 4 All ER 331 ***(refd)***
Merita Merchant Bank Singapore Ltd v. Dewan Bahasa dan Pustaka [2014] 9 CLJ 1064 FC ***(refd)***
Public Bank Bhd & Anor v. Exporaya Sdn Bhd [2013] 2 CLJ 753 CA ***(refd)***
Ricky Thong Yew Fook & Anor v. Arab Malaysian Bank Bhd [2010] 9 CLJ 905 FC ***(refd)***
Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank & Ors [1986] AC 80 PC ***(refd)***
Thomas v. Thomas [1947] AC 484 ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***
Yuill v. Yuill [1945] P15 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(g)
Legal Profession Act 1976, s. 141(1)
Limitation Act 1953, ss. 6(1), 29
Solicitors' Account Rules 1990, r. 7

For the appellant - Nichole Wee (Shahman Sangaran with her); M/s Chooi & Co
For the respondent - Muhammad Adam Abdullah; M/s Ravi Muniandy

[Editor's note: For the High Court judgment, please see Mogana Sunthari Subramaniam (Dahulunya Beramal Sebagai Rakan Kongsi Di Firma Guaman Tetuan Junaidah Mogana & Partners) lwn. RHB Bank Berhad [2014] 1 LNS 258 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Nallini Pathmanathan JCA:

Introduction

[1] This appeal relates to the extent of the duty of care, (if any), owed by a bank to its customer in relation to the bank's handling of the encashment of cheques from the customer's accounts. In the instant case the customer, which was a legal firm, had two accounts with the bank, a client's account and an office account. The claim against the bank, which was the defendant in the court below and the appellant here, was founded in negligence. The plaintiff, who is a former partner of the legal firm, instituted a claim against the bank seeking recovery in respect of the issuance and encashment of 373 cheques from the legal firm's client's account and 189 cheques issued from

the office account. (The plaintiff in the court below, it should be noted, was not the legal firm, but one of the two partners comprising the legal firm, which has since been dissolved).

[2] It is relevant to note that this is not a claim by the customer against the bank for allowing the encashment of fraudulent or forged cheques, because all the signatures on the encashed cheques were genuine.

[3] The trial judge in the court below found that the appellant ('the bank') had been negligent in its handling of the encashment of cheques from the two accounts and gave judgment in favour of the plaintiff in the sums of:

(a) RM578,630.19 being special damages; and

(b) nominal general damages of RM10,000.

[4] In the Court of Appeal, we reversed the finding of liability of the trial judge, concluding, *inter alia*, that in view of the somewhat extraordinary system adopted or put in place by the legal firm in relation to the issuance of cheques, which contributed substantially to the losses, negligence was not established against the bank.

[5] This is a case which warranted appellate intervention because, in our view, with respect, the learned judge made critical findings of fact which had no basis on the evidence. There was also a demonstrable misunderstanding of relevant evidence coupled with a demonstrable failure to consider relevant evidence. In short, we were satisfied that we were under a duty to intervene on the grounds that the trial court had fundamentally misdirected itself on issues of law and fact as set out below. (see *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229 and *Merita Merchant Bank Singapore Ltd v. Dewan Bahasa dan Pustaka* [2014] 9 CLJ 1064)

[6] We append below our full reasons for allowing the appeal by the bank.

Salient Background Facts

[7] The plaintiff in the court below and the respondent here was a former partner in a law firm known as Messrs Junaidah Mogana & Partners, which has now been dissolved. The legal firm, not the plaintiff, was at all relevant times the customer of the bank. The legal firm comprised two partners, namely, the plaintiff and one Junaidah binti Mohd Noh.

[8] The legal firm, as the customer, had two accounts with the bank at its Subang Jaya branch, namely a client's account and an office account. The plaintiff was the sole signatory for cheques for both these accounts. She gave the bank a specimen of her signature and the firm's official stamp in a specimen card by way of a mandate.

[9] In early 2004, the plaintiff went to Japan to further her studies. Before departing the plaintiff had given the bank a letter dated 29 March 2004 advising the bank that her husband, one K Harikrishnan a/l Kanthen

('SP3'), had been appointed and given the mandate to sign cheques for both accounts of the firm. Another specimen card was therefore submitted to the bank with the relevant details of the plaintiff's husband. A

[10] The legal firm's official rubber stamp however, remained the same.

[11] The legal firm employed two employees, namely one Umapathy a/p Kuppusamy ('Umapathy') who was the accounts and conveyancing clerk and one Mohd Said Huari bin Abdullah ('Mohd Said') who was the dispatch clerk. B

[12] In her letter of 29 March 2004, the plaintiff also informed the bank that she authorised the aforesaid Mohd Said to cash cheques for the legal firm. She further undertook to advise the bank in writing in the event of any change in the identity of the employee authorised to encash the cheques on behalf of the legal firm. C

[13] While she was away on her course in Japan, the plaintiff asked her sister, one Devaki a/p Subramaniam ('SP2') to retain custody of the cheque books containing the cheque leaves pre-signed by the plaintiff's husband, SP3. D

[14] SP2 was required to fill in the details or particulars on each cheque as requested or directed by the other partner in the legal firm, Junaidah bt Mohd Noh. The request for the issuance of these cheques to various parties would be made to SP3, either directly by Junaidah or through the legal clerk Umapathy. As such, all the details in these cheques were filled in by duly authorised personnel, namely SP2 or SP3. They took instructions however from Junaidah, the other partner in the legal firm or from the legal clerk employed in the firm. E

[15] Upon such issuance, the cheque would be collected by Mohd Said who would show the cheque to Junaidah for verification, after which the firm's legal stamp would be placed on the cheque. F

[16] The legal firm's rubber stamp was in Junaidah's possession and control, Junaidah being the other partner of the firm. The stamp would be affixed on the cheques on Junaidah's instructions. G

[17] Junaidah was the only person who had access to the accounts, bank statements and financial documents of the legal firm.

[18] Matters therefore proceeded in this somewhat unusual fashion while the plaintiff was away on her course in Japan. H

[19] The plaintiff returned to Malaysia in August 2006 during her semester break. She discovered that unauthorised transactions had been carried out involving two accounts with the defendant bank: Ringgit Malaysia two million four hundred and eighty-five thousand and ninety two and seventeen sen only (RM2,485,092.17) from the client's account and Ringgit Malaysia three hundred and nine thousand, four hundred and eighty-nine and fifty nine cent only (RM309,489.59) from the office account. I

[20] It is undisputed that the cheques in question were issued from the firm's cheque books for either the client's account or the office account, and were signed by the authorised signatory. In other words, the cheques were not forged cheques.

[21] These 'unauthorised' transactions may be categorised as follows:

(i) encashment of 373 cheques by use of a rubber stamp that differed from the legal firm's officially mandated stamp totalling RM4,001,778.77;

(ii) 25 cheques where the bank had stopped payment without verification from SP3. These cheques totalled RM1,517,686.60;

(iii) letters to stop 12 cheques where the signature of the signatory had been deleted and replaced;

(iv) unauthorised alterations or changes to 11 client's account cheques which were cleared for payment allegedly without SP3's approval. In these cases the name of the end recipient was altered. The legal clerk's name, Umapathy, appeared as the end recipient on several altered cheques;

(v) encashment of 28 cheques from the legal firm's client's account by persons who had no mandate to do so (given SP1's instructions that Mohd Said was the only authorised person to do so);

(vi) 29 cheques from the client's account were approved notwithstanding that there were insufficient funds (totalling RM439,033.53);

(vii) 11 cheques were approved by the bank for payment into the personal accounts of third parties and employees of the firm, namely Umapathy and Mohd Said, without the knowledge or permission of SP3;

(viii) 189 cheques from the legal firm's office account that were approved notwithstanding that the rubber stamp differed from the mandated stamp, totalling RM309,489.59; and

(ix) 18 cheques were encashed by persons without authority from SP3, namely by Umapathy, totalling RM60,150.

The Plaintiff's Claim

[22] The plaintiff therefore contended in its claim that the defendant had acted negligently, in that it had failed to detect or preclude these transactions. The plaintiff maintained that the bank had failed to comply with the mandates given by it to the bank; had negligently approved cheques with rubber stamps that did not match the mandated rubber stamp; failed to inform the signatory of this issue; failed to take reasonable steps with regard to the irregularities in the cheques presented for encashment or approval; erroneously accepted the stop payment letters allegedly issued by the legal firm to stop payment;

approved cheques that contained material amendments without procuring the requisite mandate of the signatory, etc. The plaintiff maintained that as a consequence of such negligence, there was exposure to claims from clients.

The Defence Of The Bank

[23] By way of defence, the bank denied all claims of negligence. The bank maintained that it had made payments out to named payees as specified in the cheques which were signed by authorised signatories. The bank's employees maintained that they had procured the requisite confirmation for payment out from the clerk by the name of Umapathy. The bank conceded that calls were not made to the plaintiff's husband, SP3 for verification. In short, the bank maintained that it had acted in accordance with the valid mandate accorded to it by the client, namely the legal firm.

[24] Apart from defending the claim on the basis of the factual matrix, the bank also raised four other issues of significance.

(a) Locus Standi Of The Plaintiff

[25] The bank maintained that the plaintiff's claim was unsustainable in law as the loss and damage suffered from the alleged negligence was that of the legal firm and not the plaintiff. As such, the correct party to sue was the legal firm and not the plaintiff in her personal capacity. However the plaintiff had sought relief, namely damages suffered, in her personal capacity and not on behalf of the legal firm. The bank therefore maintained that the plaintiff had no *locus standi* to bring this action.

(b) Limitation Act 1953

[26] Applying s. 6(1) of the Limitation Act 1953, the bank maintained that limitation had set in, in respect of a substantive number of cheques in respect of which the claim was filed. The plaintiff's claim was filed on 22 July 2011. However, approximately 311 cheques were issued and encashed prior to 22 July 2005, ie, more than six years prior to the claim. These cheques were therefore time-barred. The bank asserted that the date when the plaintiff discovered the alleged breach was irrelevant, as time begins to run in a cause of action founded in negligence when the cause of action first accrued and not from the date when the party discovers the cause of action.

(c) Authorised Cheques

[27] The bank relied on the fact that all the cheques in question were signed by the duly authorised signatory of both accounts. All cheques were validly issued from the legal firm's cheque books. None of the signatures was a forgery.

[28] As such, it followed that the bank could not be faulted for having paid out on cheques issued by duly authorised signatories. The issue of negligence could not arise when there was no question of the signatures being a forgery.

A *(d) Undue Delay On The Part Of The Plaintiff*

[29] The bank also relied on the fact that there was considerable delay on the part of the plaintiff in filing the claim, which prejudiced the bank in its defence. At common law, a customer is duty bound to alert the bank of any unauthorised cheques which come to its knowledge. The customer also has
B a duty to exercise due care in the drawing of cheques so as not to facilitate forgery or fraud.

[30] In the instant case, statements of account for the legal firm's office account and client's account were forwarded monthly to the law firm. All
C stop payments in respect of the disputed cheques were reflected in the statements of account. Notwithstanding this, the bank was not alerted.

[31] The plaintiff herself admitted that she discovered the 'wrongful' transactions in 2006 (as evidenced by several police reports). However, the present claim was only filed in 2011.

D **Issues Before The High Court**

[32] The learned High Court Judge set out three issues for trial before him:

(i) whether the plaintiff possessed the requisite *locus standi* to bring the action;

E (ii) whether the plaintiff's claim was caught by limitation; or

(iii) whether there was negligence on the part of the defendant in the conduct of the accounts of the legal firm.

The Findings Of The High Court

F **[33]** The learned judge made the following findings of law and/or fact:

(i) on the issue of *locus standi*, the learned High Court Judge concluded that as the legal firm had been dissolved, the plaintiff possessed the requisite *locus standi* to bring this action. The liability of the plaintiff *vis a vis* the
G legal firm continued notwithstanding that the firm had been dissolved, in her capacity as a partner of the firm. As such, the trial judge found that the plaintiff had the same entitlement to bring an action against parties who were 'liable' to the firm as such;

(ii) on the issue of limitation, the learned judge found that the cause of action
H available to the plaintiff only arose in or around August 2006 when the plaintiff became fully aware of the extent of the loss and damage suffered. In short, the learned judge applied s. 29 of the Limitation Act 1953, which meant that time did not run until the date when the plaintiff discovered the 'fraud' and the loss and damage accruing therefrom. As
I such, time only began to run from August 2006, and the plaintiff was therefore well within the requisite six year period when the claim was filed;

(iii) on the issue of undue delay, the learned judge was of the view that the plaintiff had sufficiently and adequately explained the 'delay', in that she was awaiting documentation and cheque images to verify matters prior to instituting the action;

(iv) on the issue of negligence, after reviewing the law in relation to the duty of care owed by a bank to its customers in relation to the drawing and settlement of cheques, the learned judge concluded that the bank had been negligent in its management of the encashment of the duly authorised cheques across all categories of the cases listed. The learned trial judge held that there was a fiduciary obligation between the bank and its account holder whereby the bank owed a duty to manage the account holder's accounts with care and to exercise reasonable skills in controlling and protecting client monies in the bank accounts. That duty of care had been breached by the bank and as a result of such breach, the plaintiff had suffered losses. Accordingly, judgment was entered for the plaintiff; and

(v) in the course of the trial, Junaidah, the other partner of the firm who was solely responsible for instructing or directing the issuance of cheques held in the custody of SP2, was not called. The bank submitted that an adverse inference under s. 114(g) of the Evidence Act 1950 ought to be applied as Junaidah played a central role in directing and instructing the issuance of the cheques which had resulted in the alleged loss to the firm. The learned judge refused to draw such an inference on the basis that the bank had never made any attempt to contact Junaidah in the course of settling the disputed cheques.

[34] On these grounds, the learned judge concluded that the plaintiff had made out its case on a balance of probabilities and awarded judgment to the plaintiff as set out above.

The Findings Of The Court of Appeal

[35] The issues raised in the court below were raised by learned counsel for the bank before us. The submissions of learned counsel for the bank and the plaintiff-respondent were therefore substantially similar to that raised in the court below.

[36] We found, having perused the appeal records and heard learned counsel, that the learned judge, with respect, misdirected himself on the law in several aspects.

(a) Locus Standi

[37] The learned judge failed to appreciate that the entire cause of action was premised on the banker-customer relationship which subsisted between the bank and the legal firm, not the bank and the plaintiff. The claim is

founded on loss and damage resulting from the bank's alleged negligence in respect of the conduct of the legal firm's client's account and office account. The plaintiff was at all times one of two partners comprising the legal firm.

[38] The legal firm was not at any time a sole proprietorship run solely by the plaintiff. As such, the proper party to initiate any action has to be the partners of the legal firm at the relevant time, namely the plaintiff and Junaidah binti Mohd Noh, and not simply the plaintiff. The fact that the plaintiff has described herself as being a partner of the legal firm previously does not alter the nature of the claim, which has been brought by the plaintiff in her personal capacity rather than by the plaintiff as one of two partners of the legal firm. This is borne out by the fact that all monies payable under the judgment are available to the plaintiff in her personal capacity rather than the legal firm.

[39] However, the primary banker-customer relationship was between the bank and the legal firm, not the plaintiff. The learned judge, with respect, erred in law in failing to appreciate this crucial difference. As such, the wrong party instituted this action. The plaintiff cannot therefore benefit from this cause of action, which belongs to the legal firm.

[40] Put another way, the nett consequence of the finding of negligence in this suit has resulted in an order of payment of damages to the plaintiff and not the partners of the legal firm. But the plaintiff is not entitled to the recovery of any monies from the bank in her personal capacity, as she was not, in her personal capacity, the customer of the bank. Nonetheless, the nett effect of the present judgment is to grant the plaintiff damages by way of losses that she did not suffer in her personal capacity. The learned judge failed to distinguish this fundamental difference and to that extent, the claim is fundamentally flawed.

(b) Does The Factual Matrix In Its Totality Disclose That The Bank Was Negligent?

[41] We were of the view, upon a consideration of the totality of the evidence, that negligence was not established against the bank.

[42] In concluding that the bank was negligent, the learned judge failed to consider the following material facts and law:

(i) it is undisputed that all of the cheques in respect of which a claim is made were signed by a duly authorised signatory of the client's account and office account. There is no question of any of these signatures being forged. This in itself takes this case outside of the general run of cases involving banks and forged cheques. All the cheques were also validly issued from the law firm's cheque books;

(ii) by reason of the cheques in issue being signed by duly authorised signatories, and as they were validly issued from the firm's cheque books, it follows that upon presentation to the bank, the bank had the mandate to pay out on those cheques. It follows therefore that the bank cannot simply be found liable for paying out on duly mandated cheques;

(iii) in the English Court of Appeal case of *Lipkin Gorman (a firm) v. Karpnale Ltd* [1992] 4 All ER 331, the following principles were established:

(a) a bank is entitled to treat the customer's mandate at its face value save in extreme circumstances;

(b) a bank is not obliged to question any transaction which is in accordance with the mandate unless a reasonable banker would have grounds for believing that the authorised signatories are misusing their authority for the purpose of defrauding their principal or otherwise defeating the principal's true intention;

(c) if a bank does not have reasonable grounds for believing that there is a fraud, it must pay out on cheques. Mere suspicion or unease are insufficient to justify a bank failing to act in accordance with a mandate; and

(d) a bank is not required to act as an amateur detective.

(iv) The rationale in *Lipkin Gorman*'s case was cited with approval by this court in *Public Bank Bhd & Anor v. Exporaya Sdn Bhd* [2013] 2 CLJ 753; [2013] 1 MLJ 507. A summary of those principles has been succinctly set out by learned counsel for the bank and we adopt the summarisation below:

(a) the correct test to be applied is whether a reasonably prudent banker, faced with the same circumstances, would regard the course of action taken on the facts as justifiable. Common sense must prevail;

(b) in each case, the court must determine the bank's obligation against the background of day to day commercial activity; and

(c) the bank's duty of care does not require it to do anything other than to honour the mandate in the absence of circumstances which put the bank on inquiry.

(v) and in the case of *Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors* [2006] 3 CLJ 1; [2006] 5 MLJ 1 (FC), the Federal Court held that a bank is not obliged to question any transaction which is in accordance with a customer's mandate unless there are grounds for believing that there was a misuse of authority for the purposes of committing a fraud. (see also *Ricky Thong Yew Fook & Anor v. Arab Malaysian Bank Bhd* [2010] 9 CLJ 905; [2011] 4 MLJ 268); and

(vi) in the instant case, the cheques were clearly authorised, in that it was either SP1 or SP3 who had signed the cheques. SP2 had retained custody of the cheques and had only issued the same upon receipt of instructions from Junaidah, the other partner in the legal firm. It was Junaidah who determined the name of the account payee and whether monies were to be paid out in cash. This arrangement for the encashment of cheques was peculiar to the legal firm and known only to its partners, SP2 and SP3. The bank was never privy to any of this information. In so far as the bank's duty of care is concerned therefore, it was not breached because the cheques were validly authorised and issued. The cheques did not contain forged signatures. Neither were the cheques issued from forged cheque books. In these circumstances, it would appear that there was insufficient evidence to alert the bank of the existence of anything extraordinary that would warrant a rejection of the cheques.

[43] The learned judge failed to consider adequately or at all these salient facts, which take the present factual matrix outside of the general range of cases where a bank pays out on forged cheques. In such cases, the mandate of the customer is in issue, and liability may accrue to the bank if it has failed to take the necessary precautions to exercise due care and paying out on a fraudulent cheque. The essence of the liability for negligence in those cases turns on the fact that there is no valid authorisation or mandate accorded by the customer to the bank. That is not the case here, where SP1 and SP3 by pre-signing the cheques had given the requisite mandate.

[44] The question that therefore arose was whether given the fact that there was a genuine mandate accorded by the customer, namely the legal firm, can it be said that the bank was negligent in failing to discover that monies were being wrongfully encashed from the two accounts? As the bank's duty of care does not extend to detecting internal fraud on the part of its customers' employees, it follows that the bank cannot be culpable for the losses sustained by the legal firm. The *modus operandi* of the firm, namely the pre-signing of cheques, coupled with the retention of the cheque books by SP2 and the issuance of cheques at the behest of Junaidah (who was never called as a witness) lends itself to abuse. Having in place such an extraordinary system of encashment, the legal firm cannot now seek to lay blame on the bank for encashing duly mandated cheques validly issued by the legal firm. In summary, the duty of care owed by the bank to the customer does not extend to discovering the unauthorised acts of third parties, particularly where the cheques of the customer are validly issued and authorised.

[45] Apart from the foregoing, the learned judge failed to consider s. 141(1) of the Legal Profession Act 1976 which provides as follows:

> Subject to this section, no bank shall, in connection with any transaction relating to the account of any advocate and solicitor kept with it or with any other bank (other than an account kept by an advocate and solicitor as trustee for a specified beneficiary) incur any liability or be under any obligation to make any inquiry, or be deemed to have any knowledge of any right of any person to any money paid or credited to any such account, which it would not incur or be under or be deemed to have in the case of an account kept by a person entitled absolutely to all the moneys paid or credited to it.

[46] The foregoing statutory provision comprises a further hurdle in terms of establishing negligence against the bank. This provision was simply not considered by the learned judge.

[47] The bank also adduced evidence to the effect that it complied with the standard procedure for the clearing of account payee cheques. This was not rebutted by the plaintiff. As such, no breach of institutionally accepted modes of clearance was established so as to justify a conclusion that the bank had breached its duty of care to its customer.

[48] As stated at the outset, the learned judge had concluded that the bank had erroneously paid out on 372 cheques from the legal firm's client's account and 189 cheques from the office account because the law firm's rubber stamp was not the correct rubber stamp. However, in so concluding the learned judge failed to consider adequately or at all the following significant evidence:

(i) the plaintiff herself had used the 'false' or 'forged' second rubber stamp on correspondence to the bank instructing it to close the legal firm's client's account. This therefore amounted to an acknowledgement that this rubber stamp was in fact in used validly by the law firm;

(ii) the bank has in its records a specimen card with the 'false' or second rubber stamp for both accounts; and

(iii) the plaintiff had adopted an extraordinary system of issuance of cheques which contributed to the facilitation of internal fraud. The other partner Junaidah retained control of the second rubber stamp and determined when and how cheques were issued to clients or third parties. However, she did not give evidence at trial. The trial judge, with respect, failed to recognise the critical importance of this *lacuna* in the evidence, and this contributed to his failure to conclude that the losses suffered by the law firm were primarily due to the system adopted and put in place by the plaintiff.

(c) Are Some Of The Claims Time Barred?

[49] As stated at the outset, the learned judge utilised s. 29 of the Limitation Act 1953 to find that the cause of action available to the plaintiff only accrued upon discovery of by the plaintiff herself of the 'fraudulent' act. The issue before was whether the learned judge was correct in so applying s. 29.

[50] It must be noted that fraud or forgery was never the pleaded case of the plaintiff in the first place. The plaintiff's cause of action against the bank is for negligent payment out or encashment of a series of cheques issued by the legal firm. In other words, on each occasion that the bank paid out on a disputed cheque, it was guilty of negligence. The cause of action in negligence would therefore necessarily accrue upon payment out of the cheque. This means in effect that the cause of action would arise, or time would start to run, from the date when the cheque was negligently paid out. The date when the plaintiff discovered the same is irrelevant in a cause of action premised on negligence. As such, the learned judge erred in applying s. 29 of the Limitation Act 1953 in construing or computing the date when the cause of action accrued.

[51] The nett consequence of this error on the part of the judge is that no less than 311 cheques are effectively caught by limitation. This is because the plaintiff's claim was filed on 22 July 2011. Claims in negligence up to six years prior to that date give rise to a valid cause of action in negligence. However, the acts complained in respect of 311 cheques occurred prior to 22 July 2005 and are therefore caught by limitation.

(d) Undue Delay On The Part Of The Plaintiff

[52] We are of the view that the learned judge failed to consider that there was considerable delay on the part of the plaintiff in instituting this suit against the bank, which runs awry of the common law duty on the part of the customer to notify the bank immediately of any unauthorised cheques of which he had become aware. This is coupled with a duty to exercise due care in the drawing of cheques so as not to facilitate fraud or forgery. The plaintiff, and certainly the legal firm, failed to comply with this twin test as set out in the renowned Privy Council case of *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank & Ors* [1986] AC 80.

[53] The learned judge ought, with respect, to have considered that statements of accounts for both the client's account and the office account were issued monthly to the law firm, reflecting all payments or stop payments. As such, the details of the disputed cheques were readily available to the plaintiff and the legal firm. Notwithstanding this, no complaint was raised or action taken by the plaintiff or the legal firm against the bank until the filing of this action on 22 July 2011.

(e) Unexplained Discrepancies In The Plaintiff's Claim

[54] The following are unexplained discrepancies in the plaintiff's claim which the learned judge failed to consider:

(i) cheque no. 965871 was listed twice by the plaintiff, which amounts to a double claim. This had to be excluded from being computed in the client's account list of cheques;

(ii) one of the allegations made by the plaintiff was that the 373 client's account cheques and the 189 office cheques were wrongly paid out by the bank as the rubber stamp on those cheques was not the correct rubber stamp. However, the plaintiff herself utilised the second rubber stamp (stated to be false) as the 'Company's Chop as Per Specimen' in her letter dated 29 September 2006 and signed by her on the firm's letterhead. This was the letter instructing the closure of the client's account. As such, the plaintiff herself utilised the second rubber stamp as a valid stamp. This throws serious doubt on the veracity of the plaintiff's claim that the rubber stamp on the disputed cheques was false or erroneous;

(iii) in the course of the appeal, learned counsel for the bank outlined and pointed out that there were multiple claims in respect of the client's account, which had been confirmed by the plaintiff as listed out in an appendix. There is no entitlement to multiple claims;

(iv) there are 18 office account cheques that are double-claimed, which are also not recoverable; and

(v) with respect to the 25 cheques which the learned judge found that the bank had negligently stopped payment of, he failed to consider that the plaintiff cannot complain that a cheque has been wrongfully paid out and also wrongfully stopped at the same time. Similarly the learned trial judge failed to consider that in respect of cheques which were stopped by reason of insufficient funds, no payments out were made, and therefore no claim can lie against the bank as no loss was suffered.

(f) The Evidence In Support Of The Plaintiff's Claim Is Flawed

[55] The learned judge erred when he failed to recognise the importance of Junaidah's testimony in court in relation to the plaintiff's claim. Junaidah was the partner of the law firm who had managed the administration while the plaintiff was away in Japan. All the cheques had been issued at the behest of Junaidah who gave instructions to SP2 to fill in the pre-signed cheques and hand over the same to the law firm, including all cash cheques. As such, she was in the best position to explain how and why the disputed cash cheques (and other cheques) were encashed.

[56] Importantly, the law firm's rubber stamp was in Junaidah's control and possession and was affixed on cheques upon Junaidah's instructions.

[57] As the other partner in the partnership, Junaidah was the only other person who had access to the bank's accounts, statements and other financial documents of the law firm. As a partner of the firm, her acts and omissions bind the firm. In other words, if Junaidah chose to encash monies from the firm's account, then this is binding on the firm and the bank cannot be faulted for any loss arising therefrom. The proper recourse would be against Junaidah.

[58] It is evident from the foregoing that Junaidah's evidence is crucial to account for both the issuance of the cheques (for example the use of the second rubber stamp) as well as the monies encashed from these accounts.

[59] However, for no explicable reason the plaintiff, on whom the burden of proof lies, failed to call Junaidah. This stark failure suggests that the failure or refusal to call Junaidah as a witness amounted to a withholding of evidence. The presumption under s. 114(g) of the Evidence Act 1950 ought to have been invoked, namely that if Junaidah had been called by the plaintiff, her evidence would have unfavourable to the plaintiff.

[60] However, the learned judge here erred in concluding that since the bank had not contacted Junaidah, an adverse inference need not be drawn. The learned judge misdirected himself in so concluding because the burden at all material times was on the plaintiff to explain why the bank should be held liable in negligence in respect of cheques issued and authorised by a partner in a legal firm having an account with the bank.

[61] The learned judge also failed to consider or give any weight to the fact that the plaintiff admitted that she had brought a suit against Junaidah in negligence and breach of partnership duties, in respect of the same financial transactions that were the subject matter of the present suit. In that suit, the plaintiff had accused Junaidah of manipulating the clients' monies. Clearly, this is a suit that should have been heard together with the present suit in order that a single court would have a composite picture of the events giving rise to the losses stated to be suffered by the legal firm.

[62] In any event, the failure of the plaintiff to disclose in the present suit allegations of misconduct or dishonesty of her fellow partner in the legal partnership amounts to a serious transgression, as it obviates any possibility of negligence on the part of the bank. In this context, the serial filing of suits (in instalments) as it were, amounts to a serious abuse of the process of the court.

(g) The Procedure Adopted By The Bank

[63] The learned judge failed to consider the evidence adduced by the bank in relation to the procedures it undertook prior to encashment of the cheques. The learned judge failed to have regard to the standard procedure for banks when presented with a 'cash' cheque, which is essentially to ensure that the cheque has been signed by an authorised signatory in accordance with its mandate.

[64] A perusal of the full list of cheques discloses that the majority were made out to the legal firm itself, the plaintiff and/or for her benefit, to various statutory bodies and authorities, to other law firms and to Mohd Said who was duly authorised by the firm to encash cheques on its behalf. There was a failure to consider the pertinent evidence of the plaintiff who admitted in

cross-examination that the law firm did in fact intend to issue these cheques and for them to be paid out. If a good money of these cheques were payable to the law firm itself, the alleged loss and damage to the law firm becomes illusory.

(h) Loss Or Damage Was Caused By The Legal Firm Or The Plaintiff's Own Negligence

[65] As stated at the outset, this is not a case of forged cheques. A duty of care is in fact owed by the customer to the bank to ensure that it exercises due care in the drawing of cheques so as to preclude fraud or forgery (see *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank & Ors* [1986] AC 80).

[66] The learned trial judge, with respect, failed to recognise that the legal firm had failed to exercise due care and caution in the drawing and issuance of cheques, had failed to put in place a system to safeguard against the acts and omissions of its employees or partners, had failed to monitor transactions from these two accounts adequately or at all, notwithstanding that monthly statements were duly issued. There was a failure to consider that the legal firm had been contributorily negligent in allowing the pre-signing of cheques and in the protocol adopted for issuance of cheques. Significantly, the plaintiff had appointed her husband a signatory, notwithstanding that he is not an advocate and solicitor, thereby breaching r. 7 of the Solicitors' Account Rules 1990. These material facts were not considered by the learned trial judge.

[67] The acts and omissions of the plaintiff's fellow partner, Junaidah, as well as the clerk, Umapathy, who has since been convicted on criminal charges in respect of the irregularities arising in this case, clearly played a key role in the losses suffered by the law firm. The learned judge failed to consider these fundamental facts, which diminish or preclude negligence on the part of the bank.

Powers of The Appellate Court

[68] In so reversing the finding of the learned trial judge, we were acutely aware of the limited power of an appellate court to reverse findings of fact of the judge who has heard the evidence. However, this was a case where we were satisfied that the learned trial judge was plainly wrong. This was a case where the trial court failed to judicially appreciate the evidence. (see *Thomas v. Thomas* [1947] AC 484; *Clarke v. Edinburgh and District Tramways Co Ltd* [1919] SC (HL) 35, 36-37; *Yuill v. Yuill* [1945] P15; *Gan Yook Chin & Anor v. Lee Ing Chin* [2004] 4 CLJ 309; and *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453)

[69] In all the circumstances of the case, we were satisfied that negligence had not been established against the bank on a balance of probabilities. Accordingly, we allowed the appeal with costs of RM20,000 here and below. The deposit was refunded.